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No. 10

Supreme Court, U.S.
FILED
101206 APR 1 - 2011
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

MARY SCOTT DOE, et al.,

Petitioners,

v.

BARACK HUSSEIN OBAMA,
in his official capacity
as President of the United States, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

R. Martin Palmer
Law Offices of Martin Palmer
21 Summit Avenue
Hagerstown, MD 21740
(301) 790-0640
(301) 790-0684 (Facsimile)
info@martinpalmer.com
Attorney for Petitioners

QUESTIONS PRESENTED

1. This case presents the single question: whether the District Court erred in holding that Mary Scott Doe, a frozen embryo, and all the other frozen embryos, similarly situated, is not a person, entitled to the rights and protections of the Fourteenth Amendment of the Constitution.

The decision in this case will, in effect, determine the constitutionality of the *Roe v. Wade* decision of the Court, and of every other decision of that Court denying personhood of one in utero, together with the rights and protections guaranteed by that Constitution, including standing in the Courts.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were Mary Scott Doe, a human embryo "born" in the United States (and subsequently frozen in which state of cryo-preservation her life is presently suspended), individually and on behalf of all other frozen human embryos similarly situated; National Organization for Embryonic Law (NOEL); Peter and Suzanne Murray; Tim and Courtney Atnip; Steven and Kate Johnson; Gregory and Cora Best, Plaintiffs.

Barack Hussein Obama, in his official capacity of President of the United States; Charles E. Johnson, acting secretary of the Department of Health and Human Services; Raynard S. Kington, acting director of the National Institutes of Health; Kathleen Sebelius, secretary of the Department of Health and Human Services; and Francis S. Collins, director of the National Institutes of Health, Defendants.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2010

MARY SCOTT DOE, a human embryo "born" in the United States (and subsequently frozen in which state of cryo-preservation her life is presently suspended), individually and on behalf of all other frozen human embryos similarly situated; NATIONAL ORGANIZATION FOR EMBRYONIC LAW (NOEL); PETER MURRAY and SUZANNE MURRAY, COURTNEY ATNIP and TIM ATNIP, STEVEN B. JOHNSON and KATE ELIZABETH JOHNSON, CORA BEST and GREGORY BEST

Petitioners,

versus

BARACK HUSSEIN OBAMA, in his official capacity as PRESIDENT OF THE UNITED STATES; CHARLES E. JOHNSON, in his official capacity as acting secretary of the DEPARTMENT OF HEALTH AND HUMAN SERVICES; and RAYNARD S. KINGTON,in his official capacity as acting director of the NATIONAL INSTITUTES OF HEALTH; KATHLEEN SEBELIUS, in herofficial capacity as Secretary of the DEPARTMENT OF HEALTH AND HUMAN SERVICES; and FRANCIS S. COLLINS, in his official capacity as director the NATIONAL INSTITUTES OF HEALTH

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Mary Scott Doe, National Organization for Embryonic Law (NOEL), Peter Murray and Suzanne Murray, Courtney Atnip and Tim Atnip, Steven B. Johnson and Kate Elizabeth Johnson, and Cora Best and Gregory Best, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit dismissing the within case on the basis of standing entered in the above-entitled proceedings on January 21, 2011.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reprinted in the appendix hereto at A-.

The memorandum opinion of the United States District Court for the District of Maryland is reprinted in the appendix hereto at A -

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals dismissing Petitioners' appeal on the basis of standing was entered on January 21, 2011 (A -). Jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amendment V

U.S. Const. Amendment XIII

U.S. Const. Amendment XIV

Dickey-Wicker Amendment, Pub. L. No. 111-8, Division F, Sec. 509(a), 123 Stat. 524, 803

STATEMENT OF THE CASE

On March 26, 2009, Plaintiffs-Appellants commenced the action in *Doe v. Obama* by filing their Complaint, naming the President of the United States, the Acting Secretary of Health and Human Services, and the Acting Director of the National Institutes of Health ("NIH") as parties defendant and seeking, *inter alia*, to declare Executive Order 13505 unconstitutional as violating the equal protection and due process guarantees of the Fifth and Fourteenth Amendments and as violating the prohibition against slavery and involuntary servitude set forth in the Thirteenth Amendment, and as null and void as in excess of the President's powers due to its violation of the Dickey-Wicker Amendment. Defendants-Appellees moved to dismiss the Complaint on June 2, 2009, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). By Order entered November 24, 2009, the District Court granted the motion to dismiss and dismissed the Complaint for lack of standing.

Following issuance of the final NIH Guidelines to carry out the President's Executive Order, on August 21, 2009, Plaintiffs-Appellants commenced the action in *Doe v. Sebelius* by filing their Complaint, naming the Secretary of Health and Human Services and the Director of NIH as parties defendant and seeking to review, invalidate and set aside the final NIH Guidelines for Human Stem Cell Experimentation promulgated by the defendants on July 7, 2009 ("NIH Guidelines"), largely on the same grounds as in *Doe v. Obama*. Defendants-Appellees moved to dismiss the Complaint on October 27, 2009, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). By Order entered December 11, 2009, the District Court granted the motion to dismiss and dismissed the Complaint for lack of standing. The two cases were consolidated on appeal before the Fourth Circuit.

In 1996, Congress enacted the Dickey-Wicker Amendment

as a rider to an appropriations bill, unambiguously prohibiting federally funded research resulting in the creation or destruction of human embryos. Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, § 128, 110 Stat. 26 (1996). Specifically, the amendment prohibits federal funding for "the creation of a human embryo or embryos for research purposes" as well as "research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to a risk of injury or death greater than that allowed for research on fetuses in utero" under existing federal regulations. *Id.* The Dickey-Wicker Amendment has been reenacted annually by Congress. Pub. L. No. 111-8, Division F, § 509(a), 123 Stat. 524, 803.

President Clinton, late in his second term, supported an interpretation of the Dickey-Wicker Amendment by the then General Counsel for Defendant Health and Human Services (HHS), Harriet Rabb, that would have purportedly allowed federal funding for experimentation on human embryo stem cells, as long as *private* funds were used to "derive" or extract those stem cells from human embryos, a process that results in the destruction of the embryos. The Rabb interpretation was never fully implemented and utilized during the Clinton Administration, and "the practical effect on federal funding of human ES cell research was an absolute ban." *See* J. Braswell, "Federal Funding of Human Embryo Stem Cell Research," 78 *Chicago-Kent L. Rev.* 423, 432-433 n. 70 (2003).

On August 9, 2001, in a nationally televised address, President George W. Bush announced that federal funding would be made available for human embryo stem cell research, but only for research on certain existing human embryo stem cell lines, "where the life and death decision has already been made." *See* Remarks by President Bush on Stem Cell Research ["Bush's Remarks"], Aug. 9, 2001

(http://usgovinfor.about.com/b1whrlease16.htm). President Bush emphasized that allowing research on these existing stem cell lines "allows us to explore the promise and potential of stem cell research *without crossing a fundamental moral line, by providing taxpayer funding that would sanction or encourage further destruction of human embryos that have at least the potential for life.*" *Id.* (emphasis added). He further recognized that "[e]mbryonic stem cell research is at the leading edge of a series of moral hazards," and that "while we must devote enormous energy to conquering disease, it is equally important that we pay attention to the moral concerns raised by the new frontier of human embryo stem cell research. Even the most noble ends do not justify any means." *Id.* More specifically, President Bush recognized that "[r]esearch on embryonic stem cells raises profound ethical questions, because extracting the stem cell destroys the embryo, and thus destroys its potential for life. Like a snowflake, each of those embryos is unique, with the unique genetic potential of an individual human being." *Id.*

Subsequently, on June 20, 2007, President Bush issued Executive Order 13435, directing the Secretary of HHS to conduct and support research "on the isolation, derivation, production, and testing of stem cells that are capable of producing all or almost all of the cell types of the developing body and may result in improved understanding of or treatment of disease and other adverse health conditions, *but are derived without creating a human embryo for research purposes or destroying, discarding, or subjecting to harm a human embryo* or fetus." Executive Order 13435, 72 Fed. Reg. 34591, § 1(a) (June 20, 2007) (emphasis added). In ordering the Secretary of HHS to conduct research on "alternative sources" for the derivation of pluripotent stem cells, i.e., sources other than human embryos, President Bush in his Executive

Order further directed that the Secretary's activities "shall be clearly consistent with" certain specified "policies and principles," including that

> (c) *the destruction of nascent life for research purposes violates the principle that no life should be used as a mere means for achieving medical benefit of another;*
>
> (d) *human embryos* and fetuses, *as living members of the human species, are not raw materials to be exploited or commodities to be bought and sold;* and

E.O. 13435, § 2(c) & (d) (emphasis added).

On March 9, 2009, less than two months after his inauguration, Defendant President Barack Obama signed Executive Order 13505, which provides (1) that "[t]he Presidential statement of August 9, 2001, limiting Federal funding for research involving human embryonic stem cells, *shall have no further effect as a statement of governmental policy*" and (2) that "Executive Order 13435 of June 20, 2007, which supplements the August 9, 2001 statement of human embryonic stem cell research, *is revoked.*"[1]

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[1]Our nation is conflicted over the question of the equal humanity and personhood of the preborn child.

Over half a million 'children in vitro' are scattered throughout America's in vitro fertility centers, abandoned by their genetic mothers and fathers. These 'children in vitro' are kept in a state of cryopreservation in canisters of liquid nitrogen at minus 259 degrees Fahrenheit in what have been termed "frozen orphanages."

Married couples (a man and a woman) unable to have children of their own are now coming to these 'frozen orphanages' in ever-increasing numbers and adopting human embryos, which when returned to the warmth of life (you have to do it very gently) and

Adopted human embryos are now successfully thawed, implanted and born into this pretty world after having been frozen as such for up to ten (10) years and longer. Frozen human embryos that had been stored in liquid nitrogen for thirteen (13) years were thawed, implanted and the adoptive mother gave birth to healthy twin girls on March 23, 2011, as this petition itself is being written. These embryos were placed for adoption by Embryo Adoption Services of Cedar Park located in Washington State.[2] Recently a 42-year-old woman gave birth to a

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implanted in the womb of the adoptive mother, can be brought to term and born into the light of day nine months later.

The Roe decision of this Court, a medical and scientific anachronism of the past, spoke of the "viability" of the preborn child, which the Court of the last century (38 years ago — 1973) defined as the "ability to exist by natural or artificial means outside of the womb." In 1973 this meant an incubator in a preemie nursery at a hospital. The Roe Court said that at the point of viability the state had a right to protect the life of the child.

Preborn 'children in vitro' (frozen human embryos) are now "existing by artificial means [canister of liquid nitrogen] outside of the womb" and adopted from these 'frozen orphanages.'

[2] Because the technique of storing living human embryos in a frozen state for future use is a relatively new technology, as the years pass the incredible viability of a frozen human embryo is being demonstrated to mankind daily with ever-increasing periods of frozen storage, followed by successful implantation and birth into the light of day. Because of this, Great Britain has recently extended the time period for which human embryos must be preserved if not claimed by their genetic parents to 55 years. A special news presentation of King 5 News out of Seattle, Washington contains extraordinary footage of the beauty of human embryo adoption. It can be viewed at **www.adoptanembryo.net** ("8/16/10 Embryo Adoption Good Choice for Some Couples, King 5 News," scroll down right-hand side of face page and click on icon for King 5 News piece).

In oral argument before the Fourth Circuit, a beautiful color book entitled *101 Miracles: Snowflakes 1998 to 2006* was upheld from the podium so that the judges might view its full-color pages (each page measure 11 ½ by 9") of adopted human embryos born during this time period. The photographs in the book submitted by parents that

human embryo frozen (cryo-preserved) for 20 years. Her new child is the sibling of an earlier child she gave birth to 20 years ago when she underwent in vitro fertilization at the Jones Institute for Reproductive Medicine at the Eastern Virginia Medical School. What occurred is she realized that the 'child-in-vitro' she had left behind deserved an equal opportunity to be returned to the warmth of life, and so she returned to claim her left-behind frozen human embryo and implanted this 'child-in-vitro' in her womb. Her second child now born into the light of day could just as easily have been destroyed in the denatured biology of human embryo experimentation and vivisection. Thus, the incredible viability of the human embryo is demonstrated to man — human embryos that are so small they would neatly fit on the tip of a needle. The estimated 500,000 human embryos scattered throughout the IVF labs of our nation would fit neatly inside a cube the size of a die. Thus, the future population of a city the size of Atlanta, it has been computed, would fit neatly into a cubic area no bigger than the size of one

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went through the Snowflakes human embryo adoption program in Fullerton, California, show adopted human embryos ranging in age from newborns to toddlers, up to those adopted at the beginning of the Snowflakes program in 1998 who are now 13 years of age, one of which is pictured with her pompoms at the stadium where she is a junior high school cheerleader. Zara Johnson (in a younger photo) is also pictured with her parents. Since seeing is believing and we are caused to realize the incredible "viability" (the word on which much turned in the *Roe* case of the last century) and wonder of life, the book is made available to this court online at http://tiny.cc/dclym. Attorney Ron Stoddart, Director of the Snowflakes human embryo adoption program out of Fullerton, California, indicates this same book was made available to President Bush immediately prior to his veto on May 25, 2005, of the congressional legislation that would have begun human embryo experimentation. The president then invited some of the families featured in this book to the East Room where he held these adopted human embryhos in his arms for all the world to see and understand the reason why he had used the first veto of his presidency to halt this denatured biology.

of the dice of a child's game, and yet whether these children live or die should not be a 'roll of the dice' but a certitude of the law upholding and protecting their inalienable rights endowed by their Creator at the moment of fertilization.

Such inalienable rights endowed by the Creator must be enshrined in the law, not depend upon a 'roll of the dice' or whim of chance as to whether or not their parents are fully comprehending the equal humanity of their 'children-in-vitro' as did this 42-year-old woman. Nor should the inalienable rights of 'children-in-vitro' depend upon whether or not the political party in power is respecting or rejecting those rights. This is not a political issue and should never be made such. Inalienable rights are not the subject of politics. To deny the inalienable rights to the least of the human family is ultimately to deny them to all of humanity.

Married couples who have adopted frozen human embryos now number over 3,000 worldwide. The science allowing for adoption of 'children in vitro' is new, but the joy of adopting children is quite old.

Some of these married couples who know of the joy of adopting human embryos accepted an invitation from President Bush to come to the White House and bring their children on May 24, 2005.[3] They appeared with the president in the East Room of the White House, where the president held many of the children in his own arms with the adoptive parents beaming beside him as he explained why he had vetoed new congressional legislation to begin the denatured biology of human embryo experimentation

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[3] Some of these same couples who appeared at the White House with President Bush later stepped forward to become plaintiffs in the instant case. They were joined by Father Clifford Stevens (now of Boys Town USA), not in his capacity as a Catholic priest but as the president and founder of NOEL (National Association of Embryonic Law).

(cleverly renamed by the experimenters "human embryo stem cell experimentation" — human embryos must still be vivisected and killed to extract their stem cells). Not a person on the planet has benefited from human embryo stem cell experimentation. The hope lies with adult stem cell experimentation, which does not harm the adult human beings — some skin cells, for example, are extracted. These are not later rejected by the donor when reimplanted, having come from the donor's own body.

Mary Scott Doe[4] is used as a pseudonym to stand for "children in vitro" left behind in America's 'frozen orphanages,' with their souls on ice.

The plea on behalf of Mary Scott Doe to halt her destruction at the hands of the present administration was rejected on the basis of "standing" by the lower federal district court, which denied standing to plaintiffs herein, adopting parents of other human embryos and National Organization for Embryonic Law (NOEL).

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[4] Mary Scott Doe, a pseudonym denoting the human embryo, bears the middle name of "Scott" reminiscent of the *Dred Scott* case of 1857 that is remembered as having stood for the proposition that the black man was not person but property. The same issue is brought before the Court a century and a half later, cleaned up, miniaturized and sanitized: Is a human embryo to be respected as an equal member of the community of man or is she to be treated as property which can be given over by her genetic parents into an involuntary servitude for human embryo stem cell experimentation, requiring vivisection and death? The same human embryos which the Dickey-Wicker Amendment seeks to protect (referenced below in this case and related case pending in the District of Columbia Circuit), if properly recognized as an equal member of the community of man and placed for human embryo adoption, can be removed from the deep freeze of cryopreservation, implanted in the womb of an adopting mother and be born into the sunshine of our world so that she might fulfill her destiny and display the unique and special gifts given her by her Creator. Mary Scott Doe represents the next human embryo at any given moment in time that is given over to vivisection and death. Since it is not possible to know with specificity which one this will be, she purposely bears the pseudonym Mary Scott Doe.

Mary Scott Doe was also found to lack standing in her own right, and yet she is the true subject of the Dickey-Wicker Amendment which Congress passed to protect her. On appeal to the Fourth Circuit Court of Appeals, hearing was held before Chief Judge Traxler, Judge Wilkinson and Judge Shedd on December 7, 2010. One of the adopted human embryos who appeared in the East Room of the White House with President Bush on May 24, 2005, was present in the courtroom in Richmond on December 7, 2010. Now eight years of age, Zara Johnson, who knows that she was adopted as a human embryo, stood before the court in her red Christmas dress holding the hand of her mother and was introduced to the court. When she had heard her mother say that the judges felt human embryos lack "standing," she wanted to go and 'stand' before the court to show that: "I'm a human embryo and I can stand." A bright young girl who excels in school, athletic and normal in every way, she's quite charming.[5]

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[5] Her adopting father, wheelchair bound prior to her adoption due to an automobile accident, had come to the White House to meet with President Bush earlier, along with national radio host, Joni Earickson-Tada, a quadriplegic, and others wheelchair bound, to tell President Bush that even if the proposed denatured biology of human embryo experimentation which the Congress wanted to begin could allow them to get up out of their wheelchairs and walk tomorrow, they did not want it to take place because it meant sacrificing living human embryos like their daughter. The president listened.

Christopher Reeves, also wheelchair bound from a horse-riding accident, came to the White House to urge the president to begin human embryo experimentation in the hope that it would allow him to get out of the wheelchair. Christopher Reeves and his wife, who was an equal advocate for human embryo experimentation after her husband's death, are no longer with us.

Tragically, little Zara Johnson's adopting father, Steve Johnson (one of the plaintiffs herein), was killed in his wheelchair when he was struck by a speeding ambulance in the fall of 2010. His daughter now stands for him and has the potential to become a judge herself someday.

Nevertheless, the court found Mary Scott Doe as a human embryo lacked "standing." They blamed this Court.

REASONS FOR GRANTING THE WRIT

I. The Genius of the Painter Michelangelo and the Final Judgment

The genius of the painter Michelangelo gave us the paintings on the wall and ceiling of the Sistine Chapel, which tell the story of a very old book beginning with Creation and ending with the Last Judgment.

The Creator is shown with outstretched arm across the Sistine Chapel ceiling in the act of the Creation of Adam in His own image.

Our nation's Declaration of Independence is grounded in reverential respect for the Creator who endowed unalienable rights to humankind: "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness ..." (Declaration of Independence)

If we could but see it, the human embryo figuratively glows with a white hot incandescence, having just been released from the fingertip of God. As her Creator, God sees her future. Do we see her present — her equal humanity — her opportunity to be adopted as a human embryo so that she may fulfill her destiny?

Does our law accord her equal rights under our nation's Constitution, including the right to be free from slavery prohibited by the Thirteenth Amendment? Mary Scott Doe is a 'being,' and being human, she is a human being.

She is 'person' and not property because she is the only property which has the property of building herself. She is created in the image of her Creator. Her creator, God, is a person, and therefore, Mary Scott Doe, created in His image, is a person as well.

The courts below would like to have decided these questions, but instead 'decided not to decide,' pointing their finger at this Court and laying blame at its portal. The Fourth Circuit Court of Appeals in Richmond as much as said so in the opening paragraph of their opinion:

> "We appreciate the sensitivity of the underlying issue and respect the sincerity of the arguments on all sides of the question. However, as a matter of law, the **principles of standing enunciated by the Supreme Court** mandate an affirmance of the judgment." (referencing the judgment below which dismissed the case for lack of standing).

If Michelangelo were to depict these lower federal court jurists in his "Last Judgment" on the altar wall of the Sistine Chapel, they all would be pointing a finger at the judges of this Court, seeking to be judged blameless for having only "followed orders"[6] of their higher earthly court and judgment seat.

II. Act of Congress Bypassed by Executive Order

The lower federal courts claim that their hands are tied by past decisions of this Court from finding "standing" for Mary Scott Doe to come into court and protest her own destruction at the hands of the current Chief Executive, who by Executive Order has sought to bypass a legitimate act of Congress, the Dickey-Wicker Amendment, which provides in pertinent part:

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[6] The defense at Nuremberg.

> "SEC. 509.(a) None of the funds available in this Act may be used for—
> (1) the creation of a human embryo or embryos for research purposes; or
> (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allow for research on fetuses in utero ..."

Mary Scott Doe, by her next friends and Co-Plaintiffs, National Organization for Embryonic Law (NOEL) and parents of adopted human embryos, went to great lengths in their brief below to explain how a proper interpretation of this Court's cases permits "standing." Nevertheless, the lower courts pushed the door tightly closed — casting the finger of blame at this Court.

If they are right, it is presumed this Court will not issue its writ of certiorari. The brush of the artist waits to complete the painting of the final judgment.

Because of the gravity of the issues and the responsibility of these innocent lives entrusted to the care of an advocate, yours truly does not trust himself to write their brief alone but has instead invited Father Clifford Stevens, 85 years of age, former editor of the *Priest's Magazine* and founder of the first monastic community since the thirteenth century, to write the body of this petition for writ of certiorari which follows. This monastic community founded in the State of Nebraska was a contemplative life of silence, study and prayer. Father Stevens used his time to study constitutional law, having founded the National Organization for Embryonic Law (NOEL), one of the plaintiffs in the instant case. From his time of silence he now speaks out and respectfully points out for the court that the nation has arrived at a new **juridicial moment**.[7]

[7] Father Stevens, a student of all the great jurists of the past, including most especially Justice Louis Brandeis, after whose wisdom

III. New Juridic Moment

The scientific and empirical data of the embryonic life of the human species has not been presented to the Court with the wealth of detailed information that the subject deserves.[8] The impression is given that the human

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he patterns his brief, could easily have been, and indeed may be, a modern-day Brandeis, lacking only the formal qualification of a law school diploma.

Chief Judge John Marshall lacked a high school diploma as well as a college or law school degree. His intellect saw him through. Yet his seated statue is to be found on the first floor of the Court with his words etched in gold on white marble for school children to read touring the Court. When these same children return home and look up John Marshall in their World Book encyclopedia, for example, to prepare a homework assignment on his life, they find the following: "Marshall was born on Sept. 24, 1755, in a log cabin near Germantown, Virginia. His mother was related to Thomas Jefferson. John's father served in the Virginia House of Burgesses and as a county sheriff. John spent much of his first 20 years helping to raise his 14 younger brothers and sisters on the family farm. **He had little formal schooling**.

Marshall joined the Continental Army in 1776, during the Revolutionary War in America. He spent the winter of 1777-1778 with General George Washington's forces at Valley Forge, and he was promoted to captain in 1778. **In 1780, Marshall studied law briefly** at the College of William and Mary and was admitted to the Virginia bar." ... World Book Encyclopedia, 2000 Edition

Our school children of today are learning that things were a little informal in the early days of our history. Here we have a man who rose to Chief Justice of the United States lacking high school, college and law school diplomas. He had a brilliant mind, as does Father Stevens. Fr. Stevens was an exemplary student and honors college graduate and went on to become self-taught in the law, much like John Marshall. He used his time of silence in the monastery he founded to read and digest the great Supreme Court opinions of the past. Brandeis seems to have risen to the top as the one at whose elbow he most learned and indeed has patterned his portion of the brief which follows.

[8] Cf. The indices of *Radiology*, a monthly journal of the Radiological Society of North America, 1981-2010, under the heading, *Fetus*.

embryo is simply a mass of biological cells with no human identity and therefore no human or legal status.

This is notable in the case of the surgical procedure called "Dilation and Extraction" in which the fully-formed in utero is forcibly and partially extracted from the birth canal and its head crushed by surgical instruments, or by some other method, which assures that it will emerge from the womb, fully formed, but dead.

In this case, when "Dilation and Extraction" is used as a method of abortion, the human identity of the pre-born is clear, but its human and legal status is denied by an appeal to Roe v. Wade as precedent.

The scientific and empirical data of the embryonic life of the human species clearly demonstrates that the human embryo is vastly different from the embryos of non-human mammalian species.[9] The new sciences of Radiology,[10] Roentgenology,[11] Nuclear Medicine,[12] Radium Therapy[13] and Ultrasound[14] reveal empirical evidence and observable data of the differences between the human embryo and the embryos of other mammalian species, and therefore warrants reconsideration by the Court of a tenet of Common Law which, in the past, has determined the legal status of one in utero and its pro-

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[9] *"Ultrasonic Assessment of fetal growth in non-human primates (magala mulata).* T.G. Nyland, D.E. Hull, A.G. Hendrick e al. *Radiology*, Vol. 156, 1985, pg. 283.

[10] *American Journal of Neuroradiology. European Journal of Radiology. Journal of Neuro-radiology (France). Neuroradiology (Germany). British Journal of Radiology.*

[11] *American Journal of Roentenology.*

[12] *Journal of Nuclear Medicine.*

[13] *International Journal of Radiation, Oncology, Biology, Physics.*

[14] *Journal of Clinical Ultrasound. Journal of Ultrasound in Medicine. Ultrasound in Medicine and Biology. Seminars in Ultrasound, CT & Mr.*

tection under the law: *Qui in utero est pro jam nato habetur, quoties de ejus commodo quaeritur.*[15]

I offer a parallel case in the history of the Court.

In his history of the Supreme Court, Leo Pfeiffer entitled one of his chapters, *The Flowering of Court-Protected Capitalism,* and this describes the constitutional crisis of the late 19th and early 20th century, when industrial barons and corporate magnates fought in the courts to protect the expansion of their industrial and financial empires from government regulation, and opposed efforts of workers to protect their own interests. Every attempt on the part of state and local governments to protect the rights and health of workers was defeated when the cases reached the Supreme Court.

In the eyes of the Court, following a tradition going back to John Marshall, the rights of property were absolute and the contractual rights of employers inviolable, and every attempt to further the rights of workers was declared unconstitutional, under the due process clause of the 14th Amendment. The Constitutional reasoning of the Court seemed inflexible, and as case after case came before the Court, the principle of stare decisis was invoked and it was clear that the Court would invalidate any law regulating the growth of business and industry.

Then something quite remarkable happened. Out of the dissents of Justice John Marshall Harlan and Justice Oliver Wendell Holmes,[16] the juridical process began to

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[15] *"One in the womb is considered as one already born, whenever it is a question of its benefit." Blackstone's Commentaries.* Also cited in *Black's Law Dictionary*, Third Edition, pg. 1481.

[16] Justice Holmes, in his dissent, hinted that there was something of Social Darwinism in the Court's decision in *Lochner v. New York* and that the decision embraced an economic theory based on the Survival of the Fittest, which played right into the hands of the owners of industry.

take on a new direction, especially after two classic cases in which the dissents, in their logic and cogency, overpowered the majority opinion: *Plessy v. Ferguson*[17] and *Lochner v. New York.*[18] Plessy was famous for the dissent of Justice John Marshall Harlan and Lochner for the dissent of Justice Oliver Wendell Holmes. Constitutional law had entered a new era.

That new era was highlighted by the appearance of Louis Brandeis before the Court, in a case that marked a turning point in modern constitutional history, *Muller v. Oregon*[19] in which empirical facts were given equal standing with precedent in the judicial process. This case marked the turning point from property rights to personal rights in the history of the Court, a turn that would culminate in the social legislation of the 30's and 40's and in *Brown v. Board of Education*,[20] which overturned a major Supreme Court precedent of the old era.

With *Roe v. Wade*, constitutional law is on the threshold of a new development, a new development that could have been foreseen as the protection of the law was extended from the rights of African-Americans[21] to the rights of Native Americans[22] from the rights of workers[23] to the rights of women,[24] from the rights of adults to the rights of children.[25] *Roe v. Wade* marked the entrance of those in utero into the legal arena, and unlike *Plessy v.*

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[17] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[18] *Lochner v. New York*, 198 U.S. 537 (1905)

[19] *Muller v. Oregon, 208 U.S. 412 (1908)*

[20] *Brown v. Board of Education*, 347 U.S. 483 (1954)

[21] Fifteenth Amendment of the U.S. Constitution; *Brown v. Board of Education*

[22] *United States ex. Rel. Standing Bear v. Crook*, May 12, 1879.

[23] *Muller v. Oregon*, 208 U.S. 412 (1908).

[24] Nineteenth Amendment of the U.S. Constitution.

[25] *United States v. Darby Lumber Company*, 312 U.S. 100 (1941).

Ferguson and *Lochner v. New York,* there are no precedents to draw upon in deciding the issue. New precedents have to be created. These precedents have to be based upon the empirical data of the embryonic sciences and on detailed and precise knowledge of the facts of human embryonic life.

I would call the Court's attention to numerous studies of the human embryo in the "*Radiology Journal of the Radiological Society of North America,* demonstrating with eminent clarity the human identity of the human embryo, and therefore the scientific basis for a new legal and scientific definition of human gestation:

A human subject in a state of somatic organizational and developmental repose, with an integrating principle distinct and separate from the body of the mother

And there is a body of evidence supporting the claim that *the integrating principle is a human person in the unfolding of its innate human potential, gradually experiencing, expressing and revealing its distinctly human powers.*

I would place before the Court that in any legal discussion of the human embryo, the discussion always centers on the mother, the woman who bears the embryo in her womb, with no discussion of embryonic life itself.

There are over 200 embryonic sciences and it is simply presumed, even in law, that human embryonic life is exclusively somatic, with no human subject. I argue that all the evidence from the embryonic sciences clearly indicates that the genetic structure of the human embryo is dual in nature, not merely somatic, but psychosomatic – that the biological package that we call the human embryo is a genetic singularity, original and unique, and that the genetic package has, not only a psychosomatic identity, but a psychosomatic specification as well, which we call the human person. Each embryo has an unre-

peatable human identity, carrying within itself the building blocks of the human body and the emergence into consciousness of a human person, unique and unrepeatable.

I therefore affirm, on scientific grounds, that these facts of human embryonic life lay the foundation for a new development in law itself, *Embryonic Law,*[26] some of the principles of which I have already placed before the Court.

What the embryonic sciences demonstrate, with detailed empirical data, is that the womb is the temporary habitation of a developing human being, with embryonic and extra-embryonic support systems designed specifically for the preservation and development of a human life.[27] Until now we have brought under the concern of the law the "what" of the human embryo, its somatic structure. We have not examined the evidence for a "who" of the human embryo, its psychosomatic structure, the unrepeatable identity of each human

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[26] Cf. *Embryonic Law: Its Principles and Applications*, a work in progress by Clifford Stevens: Part I – Principles: 1 – Embryonic Life: Its Origin and Development, 2 – The Fertilized Ovum: Its Biologic and Genetic Structure, 3 – The Dual Nature of the Genetic Structure, 4 – The Psychosomatic Specification of the Genetic Package, 5 – The Psychosomatic Cell: The Building Block of the Human Body, 6 – The Human Embryo as a Genetic Singularity, 7 – The "What" of the Human Embryo: Its Somatic Structure, 8 – The "Who" of the Human Embryo: Its Psychosomatic Specification, 9 – The Unrepeatable Identity of the Human Embryo, 10 – The Embryonic "I," 11 – The Nature of Human Personhood, 12 – The Human Embryo as a Distinct, Unique and Unrepeatable Human Person, 13 – Gestation as Somatic and Organizational Developmental Repose, 14 – A Human Person as the Integrating Principle of Gestation, 15 – Gestation: A Human Person Experiencing, Expressing and Revealing the Unfolding of Its Uniquely Human Powers; Part II – Applications: The Human Embryo as the Subject of Rights; Part III – The Human Embryo and the Law of Torts.

[27] Cf. Indices cited in Note 1.

embryo. There is an "I" that is the subject of rights and therefore I propose that the protection of the human embryo is a constitutional allowable goal in the face of the embryonic sciences that have not yet brought before the Court.

I place before the Court the argument that the fertilized ovum of the human species is a genetic singularity, an anthropological package, identifiable in its DNA structure and by a genetic code, revealing, not only its distinctly human identity, but a human subject as well.

The legal basis for a constitutional challenge to Roe v. Wade hinges upon the fact that the *Roe v. Wade* decision did not face and did not decide upon the constitutionality of abortion. What it faced was the constitutionality of access to abortion, under the legal fiction that the abortion laws of the past were intended to protect a woman from a surgical procedure that was unsafe and life-threatening. What was considered was the surgical procedure itself, as safe or unsafe to the health of a woman, with the conclusion that, with the advance of medical science and the improvement of surgical techniques, all danger to the woman's health had been removed. Using the Common Law principle *cessante ratione legis* cessante et ipsa lex[28] (when the reason for a law no longer exists, the law itself ceases to exist), Roe v. Wade declared all abortion laws obsolete and access to abortion a constitutional right, protected by the Fourth Amendment.

Abortion as a constitutional issue was not even considered. What was considered was abortion as a medical matter, with the conclusion that it was and remains merely a medical matter, a private matter between a woman and her doctor.

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[28] *Black's Law Dictionary*, Third Edition, pg. 302. Also Blackstone's *Commentaries*, 390, 391.

This was the hidden agenda behind the majority opinion written by Justice Blackmun and explains the twists and turns of legal reasoning that went into that opinion. The guiding principle was one that Justice Blackmun had received from a New York law professor, Cyril Means, a leading member of the NARAL (the National Association for the Repeal of the Abortion Laws). The principle was part of a complexus of opinions that Professor Means had come to in his study of the legal history of abortion. One of his conclusions was that the abortion laws of the past were chiefly, if not exclusively, framed to protect the health of women, since abortion in the past was a dangerous and sometimes fatal surgical operation for women. With the advancement of medicine, he concluded, the laws had become outmoded and he cited the legal principle quoted above as his basis for the repeal of the abortion laws.

Justice Blackmun accepted both the reasoning and the principle of Professor Means and searched as well for a constitutional principle to support access to abortion, once the laws were repealed. He found it in the ***Right to Privacy***, a ready-made principle that had resolved another landmark case, *Griswold v. Connecticut*[29], eight years before.

What the legal brief of the NARAL failed to point out was the real intent of the abortion laws of the past: they were fashioned, not primarily to protect a woman from unsafe and life-threatening surgery, although this was certainly a major concern, but to *preserve the life of those in the womb.* And this was because those laws recognized one in the womb, not merely as a potential human being, but as an actual human subject. Potentially, one in utero was a human being in a developing stage, but actually one in utero was a full-blown human subject, and as such, the

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[29] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

subject of rights and the object of law.

These are some of the facts ignored by *Roe v. Wade*, under the legal fiction that abortion laws were intended solely to protect a woman from unsafe surgery. But the primary intent of the abortion laws of the past was to protect those in the womb from an inhuman and barbaric assault on their bodily integrity, in the name of *accepted medical practice*, the *Right to Privacy*, or the Right of Dominion which a woman has over her own body. What is involved is not safe or unsafe surgery, but human rights in the embryonic moment of human existence.

Until 1918, almost every case brought before the Supreme Court dealt with the rights of adults, with classes of people: African slaves, Native Americans, African-American citizens, workers, women, Orientals, immigrants, aliens. But in a case presented in 1918, something new and unprecedented entered the legal arena: childhood. A new legal judgment, a new juridic moment was opened, requiring the application of constitutional principles for which there were really no precedents.

The legal question was this: Do the rights and immunities protected and guaranteed by the Constitution apply to children in the same way they apply to adults? Or to put it in legal terms: is the pedagogical moment of childhood to be treated in the same way as the autonomous moment of adulthood, or is childhood a juridic moment at all? Do children have the same rights and immunities as adults, under the Constitution?

In *Hammer v. Dagenhart*[30], the Child Labor case, the Supreme Court declared the Child Labor Law of 1916,[31] unconstitutional. In substance, it declared that children

[30] *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

[31] *Keating-Owen Child Labor Act* of 1916.

had no rights under the Constitution, and that the rights and immunities protected by the 14th Amendment did not apply to them.

The effects of *Hammer v. Dagenhart* doomed children to child labor for another twenty-three years.

This decision brought forth one of the most stinging dissents[32] of Justice Oliver Wendell Holmes, and it was his dissent that would provide the legal and constitutional basis for the reversal of that decision in 1941, in the *United States v. Darby.*

When Justice Harlan Fiske Stone read the opinion of the Court in *United States v. Darby,* he echoed the forceful dissent of Justice Holmes and made it clear that the pedagogical moment of childhood was indeed a juridic moment and that children had rights and immunities protected by the Constitution of the United States.

What has entered the constitutional arena for the first time with *Roe v. Wade* is the embryonic moment of those in utero, the emergence of a totally new field of law for which there are no precedents — Embryonic Law — the application of constitutional principles to those in the womb.. The legal question is: Do the rights and immunities guaranteed by the Constitution of the United States apply to those in the womb?

In *Roe v. Wade,* it was defined as a question of dominion, a woman's right over her own body. But in the case of those in the womb, I argue, we have more than a case of simple dominion, we have a case of Divided Dominion.

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[32] *"If there is any matter upon which civilized countries have agreed ... it is the evil of premature and excessive child labor. I should have thought that if we are to introduce our own moral convictions, where, in my opinion, they do not belong, this is pre-eminently the case of upholding the exercise of all the powers of the United States."*

In English Common Law, it was pre-supposed that the woman who carries a child in her womb, has absolute dominion over her own body, but only a trust-dominion over the one in the womb. Whatever dominion is exercised over one in her womb is exercised only in loco prolis, solely for the benefit of the one not yet born.

I place before the Court the argument that the question of who has dominion over those in utero is one of divided dominium, and affirm that the state also has only a trust-dominium over them, and cannot grant to a woman or her doctor the right to terminate those in the womb.

There is one more point of law that challenges *Roe v. Wade* and the practice of abortion as a constitutional issue.

It comes out of one of the most outstanding decisions of John Marshall, Chief Justice of the Supreme Court from 1801 to 1835, and the molder of most of our important constitutional traditions. The decision had to do with the Commerce Clause of the Constitution, but its importance for us is not the matter of commerce, but in principles of interpretation of the Constitution of the United States.

The principle of interpretation enunciated by Chief Justice Marshall was in a case decided in 1824: *Gibbons v. Ogden.*[33] The case involved a dispute over the Commerce Clause in the Constitution, which lays down that commerce in the United States is regulated by Congress, and not by the several states. This was a direct result of the failure of the Articles of Confederation to regulate commerce for the nation as a whole, each state placing duties and tariffs on goods from other states crossing its borders. To assure the free development of commerce between the states, and the growth of a national economy, the power to regulate commerce was placed in the Congress alone.

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[33] 22 U.S. 1 (1824).

Gibbons v. Ogden arose out of the invention of the steamboat by Robert Fulton. Fulton secured from the State of New York a monopoly on steamboat navigation on the waters of the state. Under that monopoly, a businessman named Aaron Ogden was licensed by Robert Fulton and the State of New York to operate ferryboats between New York and New Jersey. When another businessman, Thomas Gibbons, with a license from the federal government, began to run steamboats in competition with Ogden, Ogden sued Gibbons, claiming exclusive right to navigate between New York and New Jersey. Gibbon claimed that he was engaged in commerce and that the New York laws conflicted with the Constitution of the United States which laid down that only Congress could make laws regulating commerce. After the action of the lower courts, the case was brought before the Supreme Court.

In his decision, Chief Justice Marshall declared that New York had interpreted the term commerce in the Constitution restrictively, that commerce had to do, not only with buying and selling, but with the transportation of goods as well. **Terms in the Constitution**, he stated, **must be interpreted expansively**. New York's understanding of commerce, he ruled, **"would restrict a general term, applicable to many objects, to one of its significations".**

This is the principle that emerged from this case: **constitutional terms must be interpreted and applied expansively, not restrictively.** What are these terms? Any term in the Constitution: in this case the terms: commerce, regulate, provide. . But that can be applied to other terms as well: person, for instance. In *Roe v. Wade*, Justice Blackmun stated that the term person in the Constitution does not apply to those in the womb. That is a restrictive application of the term person, and "restricts a general term to only some of its significations".

This, I argue, is an invalid and unconstitutional application of the term person. According to every meaning of the word person in the Constitution and in Common Law, the word person applies to those in utero. Before *Roe v. Wade*, those in utero were protected by state laws. With the abrogation of those laws, appeal must be made to the Constitution itself and to the sources of that Constitution in the Common Law.

Louis Brandeis did more for the development of constitutional law than making the Right to Privacy,[34] a recognized constitutional right. His most significant contribution to the development of constitutional law was the Brandeis Brief, which was the basis for the Supreme Court's decision in a case involving workers' rights in 1908, *Muller v. Oregon*.

In the Brandeis Brief, Louis Brandeis set the Supreme Court in a totally new direction, a direction pioneered by the dissents of John Marshall Harlan I and Oliver Wendell Holmes, and that new direction was based on an unalterable devotion to the facts that underlie every case brought before the Court. In fact, in the judgment of Harlan Fiske Stone, one of his associates on the Court and Chief Justice from 1941 to 1946, he opened a new era of constitutional adjudication and the re-integration of the Common Law tradition into American jurisprudence:

"Justice Brandeis knew that throughout the development of the common law, the judge's decision of today, which is also the precedent of tomorrow, has drawn inspiration - and the law itself has drawn its capacity for growth – from the very facts which, in every case, frame the issue of the decision. And so, as the first step to decision, he sought complete acquaintance with the facts as the generative

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[34] *The Right to Privacy*, by Louis Brandeis and Sam Warren, Harvard Law Review, Vol. #5, December 15, 1809. Gestation: the development of the human body: the emergence of a human person

source of the law. In the facts, quite as much as in the legal principles set down in the law books, he found the materials for the synthesis of judicial decision. In that synthesis the law itself was but a means to a social end – the protection and control of those interests in society which are the special concern of government and hence of law."

In *Muller v. Oregon,* Louis Brandeis appeared before the Court with empirical data and legal arguments for a new juridic science, Labor Law, the final development in a jurisprudence that had its origins in the industrial revolution, when industry replaced agriculture as the economic base of society. Until that time, the Supreme Court had fostered and supported what has been called *court-protected capitalism,* a legal doctrine based on the rights of property, with all the rights attached to the ownership of property applied to business and industry.

With his famous Brandeis Brief, Louis Brandeis drew heavily upon the empirical data provided by industrial society itself, in every major area of industry and in every major industrial nation. He demonstrated, by superb legal reasoning on unassailable facts, that workers had rights under the Constitution and were not part of the "property" of the owners of industry.

It was a classical case of empirical data underpinning a new development of law, and the extension of the Constitution and constitutional principles into a totally new area of American society. For the first time in the history of the Court, empirical data was accepted equally with precedent as the basis for legal argument. *Muller v. Oregon* spelled the end of *court-protected capitalism,*, and ushered in a new era of individual and personal rights.

A similar development is taking place in the wake of the *Roe v. Wade* decision, and this development has a bearing on the rights of those in utero, as the Law of Labor had a

bearing on the rights of workers. *Muller v. Oregon* was the direct result of a series of cases denying rights to workers, culminating in *Lochner v. New York* in 1905. It was *Lochner v. New York* that precipitated the constitutional crisis that led to *Muller v. Oregon,* a crisis highlighted by the ringing dissent of Justice Oliver Wendell Holmes, who laid the groundwork for the reversal of that decision. It was Louis Brandeis who provided the empirical data that demonstrated that *Lochner v. New York* gave constitutional protection to the owners of industry in direct violation of the rights of workers.

In the wake of *Roe v. Wade,* I argue, a similar development is taking place regarding the rights of those in utero, Embryonic Law, and the empirical data underpinning this development is being drawn from the medical and embryonic sciences, which have grown in number and sophistication since the dawn of modern medicine. What is being brought under the scalpel of a new jurisprudence are the scientific facts of embryonic life and the extension of constitutional principles to those in utero.

What is under fire is the empirical and medical data underpinning the *Roe v. Wade* decision, most of it provided by a single legal brief of a lawyer attached to the NARAL, the National Association for the Repeal of the Abortion Laws. The new empirical data challenges the conclusions of that brief, which was based on a cursory analysis of medico-legal history. With more than 200 embryonic sciences to draw upon, and with precision instruments to record in detail the process of human gestation, the facts of embryonic life can enter the legal arena with far-reaching consequences in constitutional law.

The final conclusion of the *Roe v. Wade* decision, that the development of medical science has made obsolete the abortion laws of the past, will be shown, by that very development, to be empirically untenable. The restriction

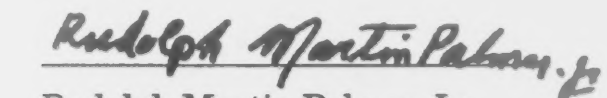
of the term person to exclude those in utero will be challenged by a new body of empirical data.

I request the Court to consider the fact that, in the light of a host of embryonic sciences, and the empirical data of embryonic life revealed by those sciences, a new juridic continent is emerging on the constitutional horizon, laying the foundation for a new development of law safeguarding the rights of those in utero. This petition has not brought to light that empirical data in detail, since it is merely a petition for Certiorari by the Court. But in the light of the arguments presented here, I would humbly request that Certiorari be granted.

CONCLUSION

For these various reasons, this petition for certiorari should respectfully be granted.

Respectfully submitted,



Rudolph Martin Palmer, Jr.
21 Summit Avenue
Hagerstown, Maryland 21740
301-790-0640
301-790-0684 (facsimile)
info@martinpalmer.com
Attorney for Petitioners

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Mary Scott Doe, et al.,

Plaintiffs-Appellants,

v. Case No. 10-1104

Barack Hussein Obama, et al.,

Defendants-Appellees.

Mary Scott Doe, et al.,

Plaintiffs-Appellants,

v. Case No. 10-1106

Kathleen Sebelius, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the District of Maryland, at Greenbelt,
Alexander Williams, Jr., District Judge
(8:09-cv-00755-AW; 8:09-cv-02197-AW)

Argued: December 7, 2010

Decided: January 21, 2011

Before TRAXLER, Chief Judge, and WILKINSON and
SHEDD, Circuit Judges

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Traxler and Judge Shedd joined.

COUNSEL

ARGUED: Rudolph Martin Palmer, Jr., Hagerstown, Maryland,

for Appellants. Benjamin Seth Kingsley, UNITED STATES

DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF**: Tony West, Assistant Attorney General, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellees.

OPINION

WILKINSON, Circuit Judge:

Plaintiffs in this case challenge the federal funding of research involving embryonic stem cells. The district court dismissed the suit for want of standing. We appreciate the sensitivity of the underlying issue and respect the sincerity of arguments on all sides of the question. However, as a matter of law, the principles of standing enunciated by the Supreme Court mandate an affirmance of the judgment.

I.

Human embryonic stem cells (hESCs) are valued by scientific researchers for their ability to transform into any

type of cell in the human body. They are derived from embryos, largely embryos created via in vitro fertilization (IVF) for reproductive purposes and donated for research when no longer needed for that reason. The process of creating hESCs generally results in the destruction of the embryo. Embryos not donated for research can also be made available for adoption.

In addition to technical discussions, the issue of stem cell research has elicited debates on the role of science in alleviating human suffering and the relationship of science to the sanctity of life. Federal funding guidelines have not surprisingly proven controversial. Although hESCs have been available for research since 1998, the National Institutes of Health (NIH) did not fund research involving hESCs until 2001. That funding, however, was restricted to research involving hESCs derived from stem cell lines already in existence. *See* Address to the Nation on Stem Cell Research from Crawford, Tex., 37 Weekly comp. Pres. Doc. 1149 (Aug. 9, 2001); *see also* Exec. Order No. 13435, 72 Fed. Reg. 34591 (June 20, 2007). On March 9, 2009, President Obama issued Executive Order 13505, 74 Fed. Reg. 10667, removing that restriction and expanding federal funding of hESC research. Executive Order 13505 also directed the NIH to issue new guidelines on that research. The NIH responded on July 7, 2009, with final Guidelines for Human Stem Cell Research ("NIH Guidelines"). 74 Fed. Reg. 32170.

Two sets of plaintiffs in these consolidated cases challenge Executive Order 13505 and the NIH Guidelines. Plaintiff Mary Scott Doe represents a putative class of all frozen embryos held throughout the United States for either research or adoption purposes. The other plaintiffs are several parents who have children that were adopted as frozen embryos and who are considering adopting embryos again. Together, plaintiffs argue that the new hESC policies violate the Thirteenth and Fourteenth

Amendments, the Administrative Procedure Act, and the Dicker-Wicker Amendment, Pub. L. No. 111-8, div. F, Title V, Section 509(a)(2), 123 Stat. 524, 803, a restriction on NIH funding which bars the use of federal funds for "research in which a human embryo or embryos are destroyed, discarded or knowingly subjected to risk of injury or death." The district court dismissed both lawsuits for lack of standing. Plaintiffs now appeal.

II.

We are not at liberty to resolve every grievance over government policy, no matter how significant, for "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). The Supreme Court has made clear that "standing is an essential and unchanging part" of that case-or-controversy requirement, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), one that "state[s] fundamental limits on federal judicial power in our system of government," *Allen*, 468 U.S. at 750. To satisfy that constitutional requirement, a plaintiff must demonstrate:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b)actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. L

Friends of the Earth v. Laidlaw Envlt. Servs. (TOC), Inc.,

528 U.S. 167, 180-81 (2000). We review de novo the district court's decision to dismiss for lack of standing. *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). We review de novo the district court's decision to dismiss for lack of standing. *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

III.

Plaintiffs first assert that the class of all human embryos currently held at IVF clinics throughout the country, including named plaintiff Mary Scott Doe, having standing to assert their constitutional and statutory rights.

A.

Plaintiffs contend that the class of frozen embryos is threatened with injury sufficient for standing because Executive Order 13505 and the NIH Guidelines increase the embryos' risk of being reduced to embryonic stem cells. By itself, this contention is insufficient. The Supreme Court has made clear that "named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Without a sufficient allegation of harm to the named plaintiff in particular, plaintiffs cannot meet their burden of establishing standing.

We cannot identify a particularized harm because he complaint does not identify any of the named plaintiffs' particularized characteristics. Instead, it leave us only with questions such as whether the embryo will ever be used for research and whether that research will be

funded by the NIH. We have no idea under what terms the named plaintiff embryo was donated or stored or what its status even is. In the absence of answers, the chosen appellation of Mary Scott doe could equally designate any member of an amorphous frozen embryo class. Indeed the complaint even states that Mary Scott Doe may be one of the embryos donated for adoption.[1] JA 15. Because the class of frozen embryos includes several subsets, we have no way of knowing whether "the claims or defenses of the representative part[y] are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3), which is to say whether the named plaintiff is threatened with the harm plaintiff impute to the class as a whole.

While plaintiffs attempt to bypass the requirement of particularized harm by asserting that all frozen embryos are threatened with harm, this is not a sound contention. The NIH Guidelines permit funding for research involving only stem cells from embryos "donated by individuals who sought reproductive treatment . . . and who gave voluntary written consent for the human embryos to be used for research purposes." 74 Fed. Reg. at 32174. Plaintiffs offer no reason to think, for example, that embryos already donated for adoption are at any risk for the injury allegedly caused by the Guidelines. Moreover, the complaint provides no basis to conclude that the named plaintiff in particular will be part of the subset that suffers any injury at all, much less an injury due to the challenged government policy. Because the injury-in-fact test requires "that the party seeking review be

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[1] Plaintiffs reserved course in a subsequent motion before this court, arguing that the named plaintiff is actually a construct "representing the next human embryo to be vivisected in the nation at any given moment of time." *Motion for Preventive Injunction* at 10. Even in such hypothetical litigants could have standing, this one cannot lest *Simon's* instruction that "named plaintiffs who represent a class must allege and show that they personally have been injured," be rendered a nullity. 426 U.S. at 40 n.20 (internal quotation omitted).

himself among the injured," *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972), we cannot conclude that these plaintiffs have alleged a "concrete and particularized" harm, *Friends of the Earth*, 528 U.S. at 180.

B.

There is an additional difficulty with the embryo plaintiffs' claim of standing. "[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairy can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon,* 426 U.S. at 41-42. Here, the NIH Guidelines restrict funding to research involving stem cells "[t]hat were created using in vitro fertilization for reproductive purposes and were no longer needed for that purpose" and "[t]hat were donated by individuals who sought reproductive treatment . . . and who gave voluntary written consent for the human embryos to be used for research purposes." 74 Fed. Reg. at 32174. Thus, the independent decision of biological parents to donate embryos for research is an intervening cause of the injury that plaintiffs assert on behalf of the embryos.

The conclusion that the injury asserted is not fairly traceable to Executive Order 13505 or the NIH Guidelines follows from the Supreme Court's pronouncements. In *Allen*, the Court addressed an allegation that the Internal Revenue Service (IRS) failed to ensure that racially discriminatory private schools were denied tax-exempt status. Though the plaintiffs had suffered a cognizable injury in the form of a reduced ability to attend a racially integrated school, the conclusion that "withdrawal of a tax exemption from any particular school would lead the school to change its policies" or that "any given parent of a child attending such a private school would decided to transfer the child to a public school as a result" was "entirely speculative." 468 U.S. at 758.

Likewise in *Simon*, the Court found it "purely speculative" to conclude that nonprofit hospitals would provide expanded care to indigent patients if their tax-exempt status were threatened. 426 U.S. at 42-43. *Allen* and *Simon* illustrate a fundamental tenet of standing doctrine: where a third party such as a private school or hospital makes the independent decision that causes an injury, that injury is not fairly traceable to the government. Here, the mere fact that the government permits private donors to choose to donate their embryos for research does not therefore make that decision fairly traceable to Executive Order 13505 or the NIH Guidelines.

Plaintiffs recognize the role of the biological parents' decision, but nevertheless maintain that the decision is not truly independent. In their view, "the decisions of genetic parents of embryos whether or not to donate their unused embryos for experimentation will be powerfully influenced" by the additional funding available under the new policy. *Brief of Appellants* at 43. But this argument cannot salvage plaintiffs' claim that any injury is fairly traceable to the challenged policies.

The NIH Guidelines already acknowledge the possibility that researcher demand for embryos driven by additional funding could influence the decision of biological parents to donate their embryos for research, and address that concern with several strict conditions. First, the Guidelines require that "[n]o payments, cash or in kind, [be] offered for the donated embryos." 74 Fed. Reg. at 32174. Second, they demand that "[p]olicies and/or procedures [be] in place at the health care facility where the embryos [are] donated that neither consenting nor refusing to donate embryos for research would affect the quality of care provided to potential donor(s)." *Id.* Third, the Guidelines require a "clear separation" between the decisions to create embryos and donate them, a sep-

aration requiring that "[d]ecisions related to the creation of human embryos for reproductive purposes [be] made free from the influence of researchers proposing to derive or utilize hESCs in research." *Id.* Where government policy not only allows the biological parents to choose what to do with their embryos, but also safeguards the independence of their decision with strict conditions, the connection between injury and policy is a "purely speculative" one. *Simon*, 426 U.S. at 42.

IV.

Plaintiffs also assert that the parents who "are actively considering adopting" human embryos have standing to challenge Executive Order 13505 and the NIH Guidelines. Assuming, without deciding, that these parents are proper parties to bring claims on behalf of the embryos, the parents themselves still must show the "irreducible constitutional minimum" of an injury in fact that is "'fairly . . . trace[able] to the challenged action of the defendant'" and that will likely be "'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (alterations in original) (quoting *Simon*, 426 U.S. at 38, 41).

A.

The parents do not allege that they have already suffered an injury. Instead, they claim that they face the threat of a future injury, namely that implementation of Executive Order 13505 will "reduce the number of *in vitro* human embryos available for adoption" such that they will be unable to adopt. *Brief of Appellants* at 53. However, they do not allege facts from which we can infer that such an injury would be "actual or imminent." *Lujan*, 504 U.S. at 564.

In *Lujan*, the Supreme Court addressed an analogous injury. There two plaintiffs challenged a regulation that interpreted a provision of the Endangered Species Act not to apply to foreign nations. The plaintiffs claimed to have

standing because they had visited other countries to observe endangered species and intended to do so again in the future. *Id.* at 564-64. The Supreme Court found these indefinite plans insufficient to confer standing: "Such 'some day intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 564.

Lujan's requirement that plaintiffs have some concrete plan constrains us here. The entirety of plaintiffs' allegation in the complaint is that some of the parents "continue to consider the adoption of and/or seek to adopt additional *in vitro* human embryos." JA 43. Although "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," *Lujan*, 504 U.S. at 561, plaintiffs are not excused from the constitutional prerequisite of alleging an injury that "is *'certainly'* impending,'" *id.* at 565 n.2 (emphasis in original)(quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)0. The imminence requirement is "stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Id.* Thus the Supreme Court has "insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.* The plaintiff parents here did not allege that they have already tried and failed to adopt embryos, nor do they allege any concrete plans for future adoption, so the possibility that they will never suffer the alleged injury looms too large.

B.

Moreover, like the class of frozen embryos, the plaintiff parents cannot establish that the claimed injury is fairly traceable to Executive Order 13505 or the NIH Guidelines. As the district court correctly noted, "it is the donor's choice which could potentially reduce the number of human embryos for adoption and not the Defendants' conduct which 'causes' Plaintiffs' alleged injury." JA 324. The parents' claim of standing thus falters for largely the same reason identified in part III.B. *supra*.

V.

Our conclusion that plaintiffs cannot establish standing in this case is a narrow one, for we do not suggest that no party would ever have standing to assert similar claims. The bar of standing must not be set too high, lest many regulatory actions escape review contrary to the intent of Congress. *See* Administrative Procedure Act, 5 U.S.C. Section 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

A complaint that provided more concrete information about the identity of the named plaintiff embryo or the plaintiff parents' plans for adoption would at least address more directly what the Supreme Court has identified as serious constitutional concerns. A sister circuit has concluded that certain scientists who compete A complaint that provided more concrete information about the identity of the named plaintiff embryo or the plaintiff parents' plans for adoption would at least address more directly what the Supreme Court has identified as serious constitutional concerns. A sister circuit has concluded that certain scientists that compete directly with hESC researchers for NIH funding have "competitor standing" to bring related claims. *See Sherley v. Sebelius*, 610 F.3d 69 (D.C. Cir. 2010). The *Sherley* plaintiffs were doctors that "specialize in adult stem cell

research, *id.* at 71, and in order to compete with embryonic stem cell researchers for NIH funding, they would "have to invest more time and resources to craft a successful grant application," *id.* at 74. That injury—an increased risk that a government agency would not choose to fund the doctors' research—is not alleged here. *See id.* at 72.

We express no opinion on the standing issue in *Sherley* or any other case not presently before this court, but simply note that such cases are different from the one that is before us. In the absence of a showing that the Supreme Court's requirements for standing have been met in this particular case, the complaint presents what is essentially a policy dispute over the administration's approach to stem cell research. We do not doubt for a moment the sincerity of those who oppose, as well as those who support, the revised NIH funding guidelines. But depth of conviction, while admirable, cannot serve to displace the court's own deep attachment to the law. "Recognition of standing in such circumstances would transform the federal courts" into more political organs, less differentiated from the workings of the political branches whose actions we are now required to review. *See Allen*, 468 U.S. at 756. Because "[c]onstitutional limits on the role of the federal courts preclude such a transformation," *id.*, we affirm the judgment of the district court.
AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

MARY SCOTT DOE, *et al*
Plaintiffs,

v. Civil Case No. AW-09-755

BARACK OBAMA, *et al*
Defendants.)

MEMORANDUM OPINION

Before this Court is a Motion to Dismiss filed on behalf of Defendants, Barack Obama, in his official capacity as President of the United States; Charles E. Johnson[1], in his official capacity as Acting Secretary of the Department of Health and Human Services ("HHS"); and Raynard S. Kingston[2], in his official capacity as Acting Director of the National Institutes of Health ("NIH") (collectively referred to as the "Government"). (Doc. No. 10.) Plaintiffs Mary Scott Doe, a human embryo frozen in cyro-preservation within the United States on behalf of herself and those similarly situated; National Organization for Embryonic Law ("NOEL"), a non-profit organization pursuing the legal protection of human life;[3] and four married couples[4]

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[1] Pursuant to Fed. R. Civ. P. 25(d), Kathleen Sebelius, as the confirmed successor to HHS's former Acting Secretary, Charles E. Johnson, is automatically substituted as the proper party defendant in this action.

[2] Likewise, Dr. Francis S. Collins, as the confirmed successor to NIH's former Acting Secretary, Raynard S. Kingston, is automatically substituted as the proper party defendant in this action.

[3] The complaint states that NOEL's "primary mission is to protect, support, educate, and pursue the legal protection of human life from its beginning at conception until after death." (Compl. ¶ 5.)

[4] Namely the couples are Peter and Suzanne Murray, Courtney and Tim Atnip, Steven and Kate Johnson, and Cora and Gregory Vest.

who are putative adopters of human embryos bring this complaint seeking declaratory and injunctive relief against the Defendants.[5] The Plaintiffs claim that President Obama's Executive Order 13505 issued on March 9, 2009, which removes some of the prior limitations on federally funded human embryo stem cell research, violates the frozen embryos' constitutional rights to due process, equal protection, and freedom from involuntary servitude under the Fifth, Fourteenth, and Thirteenth Amendments. Plaintiffs further argue that the President's Executive Order violates the Dickey-Wicker Amendment. Defendants argue, and this Court agrees, that Plaintiffs lack standing to bring this claim. The Court agrees that Plaintiffs fail to meet the requirements of standing; therefore, the Court need not engage in a detailed analysis of the substantive claims. Accordingly, this Court will **GRANT** Defendants' Motion to Dismiss.

FACTUAL BACKGROUND

This case involves highly controversial issues concerning the morality of federally funded stem cell research on human embryos. At the heart of this controversy is one method used by researchers to derive a stem cell line or source from human embryos through a process that necessitates the destruction of the human embryos. Although some believe that embryo stem cell research has the potential for developing cures to numerous diseases, others believe that the destruction of human embryos in

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[5] The complaint originally included Nightlight Christian Adoptions ("Nighlight"), "which is a licensed adoption agency . . . and operates a program known as the Snowflake Frozen Embryo Adoption program that offers families who had frozen embryos brought into being by in vitro fertilization the opportunity to place those embryos for adoption by qualified parents." According to Plaintiffs' Motion for Leave to File an Amended Complaint, Nightlight no longer wishes to remain a party in this litigation and the Court will grant that motion in a separate order.

the extraction process equates to killing human life, which the Government should not use tax dollars to support. In 1996, Congress passed the Dickey-Wicker Amendment, which is an appropriations bill that prohibits the HHS and NIH from using federal funds in either "(1) the creation of human embryos for research purposes," or (2) "for research in which human embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed on fetuses in utero . . . ." Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, Division F, Title V, § 509(a), 123 Stat. 524, 803 (2009).

Former President George W. Bush issued a statement on August 9, 2001, in which he permitted federal funding for research on stem cell lines from "embryos that have already been destroyed" and were derived by private or foreign researchers. George W. Bush, Former President of the United States, Presidential Address: Address to the Nation on Stem Cell Research from Crawford, Texas, 37 Weekly Comp. Pres. Doc. 32, 1149-51 (August 9, 2001), *available at* http://www.gpoaccess.gov/index.html (follow "Presidential Materials" hyperlink; then follow "Weekly Compilation of Presidential Documents"; then follow "2001" hyperlink; then follow "August 13, 2001" hyperlink). In his statement, Bush explained that his policy was an attempt to balance the potential benefits of stem cell research, such as improving the lives of those suffering from "juvenile diabetes . . . Alzheimer's . . . Parkinson's . . . and spinal cord injuries," and the moral and ethical concerns raised in opposition to stem cell research. *Id.* at 1149. To this end, Bush issued Executive Order 13435 on June 20, 2007, which reinforced his ban on federally funded research on stem cell lines created after August 9, 2001, and encouraged research into non-embryonic sources of stem cell research.

On March 9, 2009, President Obama issued Executive Order 13505 entitled, "Removing Barriers to Responsible

Scientific Research Involving Human Stem Cells," which removed prior Presidential limitations on stem cell research and permitted the NIH to "support and conduct responsible . . . research, including human embryonic stem cell research, to the extent permitted by law." Exec. Order No. 13,505, 74 Fed. Reg. 10667 (March 9, 2009). Specifically, Obama's Executive Order revoked Bush's Executive Order 13435 and explained that Bush's August 9 statement was no longer effective as a statement of governmental policy. *Id.* at 10668. On April 23, 2009, the NIH issued draft guidelines as directed by Obama's Executive Order, which explain that NIH has funded embryonic stem cell research on stem cells derived from human embryos prior to the August 9 deadline that were created for reproductive purposes and were donated for research after they were no longer needed for reproduction.[6] The proposed guidelines acknowledge that Obama's Order permits federal funding for research on stem cell lines created after August 9, 2001, but still limits funding to stem cell research on embryos that were created for reproduction purposes and donated for research after the donors no longer needed them for reproduction. The guidelines also include assurances that the donor was not unduly influenced in making the decision to donate the embryos for research.

Plaintiffs' complaint requests that this Court invalidate Executive Order 13505 and enjoin its implementation because it allows for federal funding of stem cell research that destroys human embryos in violation of the Dickey-Wicker Amendment and violates the embryos' constitutional rights to due process and equal protection guaranteed under the Fifth and Fourteenth Amendments and to freedom from slavery and involuntary servitude

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[6] Since the filing of the briefs on this motion, NIH issued final guidelines relating to federally funded human embryo stem cell research.

guaranteed under the Thirteenth Amendment.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, federal courts must dismiss claims where the court lacks subject-matter jurisdiction. Although courts are permitted to consider materials outside of the pleadings to determine whether it can exercise subject-matter jurisdiction, the court must generally accept as true all factual allegations pled in the complaint.

Albright v. Oliver, 510 U.S. 266, 268 (1994). However, as explained in *Twombly*, "although for the purposes of a motion to dismiss [the court] must take all the factual allegations in the complaint as true, [the court] 'is not bound to accept as true legal conclusions couched as factual allegations." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Plaintiffs bringing claims in federal court must meet the requirements of standing in order for the court to exercise subject-matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 559, 560 (1992). (stating that Athe core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.@) The A[s]tanding doctrine functions to ensure . . . that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake@ in the alleged claim. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000). Further, when considering whether a party has standing to bring an action, the focus for the Court is on the party asserting the claim and "not on the issue the party wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

Plaintiffs bear the burden of establishing the three elements of Article III standing which are: (1) injury in fact; (2) causation; and (3) redressability. *Lujan*, 504 U.S.

at 561-62. An injury in fact is "an invasion of a *legally protected* interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (emphasis added). Most notably,"the frustration of a party's generalized interest in the proper application of the law is not by itself an injury in fact for purposes of standing." *Delta Commercial Fisheries Ass'n v. Gulf of Me. Fishery Mgmt. Council*, 364 F.3d 269, 273 (5th Cir. 2004). Moreover, to show the causation element, the plaintiff must show that the suffered injury is "fairly traceable to the defendant" and not the result of the independent acts of a third-party who is not a party in the case. *Friends of the Earth, Inc.*, 528 U.S. at 180-81. Lastly, the plaintiff must demonstrate that there is a "substantial likelihood" that the alleged harm will be remedied if the Court grants the relief sought. *Id.* at 181. In addition to establishing the constitutional requirements of standing, plaintiffs must also demonstrate that their claims can survive prudential limitations to the federal court's exercise of jurisdiction. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). The Supreme Court has recognized three additional limitations to establishing standing, namely that (1) the plaintiffs' injury must be in the zone of interest the statue at issue is intended to protect; (2) plaintiffs cannot assert the claims of others unless they stand in close relationship to the third party; and (3) plaintiffs cannot air general grievances shared by a large class of persons. *See id.*

"Without such limitations—closely related to [Article] III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin,* 422 U.S. 490, 500 (1975).

The Defendants argue that even if the Court were to find that Plaintiffs meet the requirements of standing, their claims should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Because this Court agrees with Defendants, and finds that all Plaintiffs lack standing, the Court dismisses the compliant without needing to address the merits of the substantive claims.

I. Standing
A. Embryos

The complaint names "Mary Doe," an unspecified embryo frozen in a state of "cyropreservation" in some undetermined location within the United States as a Plaintiff in this action, and asserts that Mary Doe, along with nearly 20,000 other embryos, are "human beings" who will suffer an imminent threat of destruction or involuntary servitude if federal funding for stem cell research on human embryos is permitted. The so-called embryo Plaintiffs argue in their opposition that the standard for a motion to dismiss requires this Court to presume as true their "factual" allegation that embryos are "human beings." However, as the Defendants argue, the Supreme Court's decision in *Ashcort v. Igbal*, makes clear that "the tenant that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." 129 S. Ct. 1937, 1949 (2009).

The Supreme Court has already determined that the word "person [as used] in the Fourteenth Amendment does not include the unborn." *Roe v. Wade*, 410 U.S. 113 (1973).

Plaintiffs argue that the Court's holding in *Roe* and the Eastern District's decision in *Roe v. Casey*, 464 F. Supp. 483 (E.D. Pa. 1978), "were greatly influenced by the competing interests and constitutional rights of the mother," which they contend is not an issue in this case

because these embryos have not yet been implanted in a woman's womb thereby invoking the mother's rights. (Doc. No. 12 at 23-25.) Plaintiffs cite to several law review articles that argue that *Roe* and *Casey* are limited to abortion cases and thus should have no bearing on the status of embryos ex utero. However, the Court in *Roe* did consider that a pregnant woman's rights were not isolated and that at some point it would become reasonable for the State to consider another interest, namely that of "potential human life." *Roe*, 410 U.S. at 150. The Court went on to explain that it did not need to resolve the "difficult question of when life begins" because the lack of consensus in the medical field on that question suggested that the judiciary was not "in a position to speculate as to the answer." *Id.* at 158. Nevertheless, the Court looked to areas of the law outside of criminal abortion, and determined that "in short, the unborn have never been recognized in the law as whole persons." *Id.* at 162.Moreover, in dismissing a claim asserted by an unspecified embryo seeking to enjoin the NIH from submitting a report to the HHS on human fetal tissue research, this Court in *Doe v. Shalala* declined to appoint a guardian ad litem to the embryos because "embryos are not personswith legally protectable interests . . ." 862 F. Supp. 1427 (D. Md. 1994), *vacated*, *Int'l Found.*

For Genetic Research (Michael Fund) v. Shalala, 57 F.3d 1066 (4th Cir. 1995) (vacating the district court judgment because the case became moot on appeal and instructing dismissal of the case on remand), *cert. denied*, 126 S. Ct. 116 (2005). In fact, the District Court for the District of Columbia also found that embryos seeking to enjoin the NIH from implementing the finalized version of guidelines to Executive Order 13505, which were only in draft form when this motion was filed, lacked standing to pursue their claims because they "are not persons under the law."

Sherely v. Sebelius, No. 1:09CV1575(RCL), 2009 WL 3429349, at *4 (D.D.C. Oct. 27, 2009).

This Court agrees and accordingly holds that in order to establish an injury in fact, the embryos must be able show an "invasion of a legally protected interest," which embryos do not possess as they are not considered to be persons under the law. Furthermore, the Court notes that even without Executive Order 13505, parents of the unused embryos could still donate the eggs to private institutions for research purposes and it is the independent decision of parties not currently before the Court that causes the alleged harm. Thus, even assuming arguendo that embryos have a legally protected interest, this Court would still find they lack standing in this case because their injury is not "fairly traceable" to the Defendants' act of issuing and implementing Executive Order 13505.

B. NOEL

The complaint alleges that NOEL is entitled to declaratory and other necessary relief because "its purpose is a constitutional legal challenge to establish the equal humanity of preborn children beginning as human embryos." (Compl. ¶ 80.) However, the Plaintiffs' opposition to the Motion to Dismiss fails to address how NOEL has standing to bring this claim. In any event, organizations must establish standing by either bringing claims to assert the rights of the organization itself or to litigate claims on behalf of its members. *Buchanan v. Consol. Stores Corp.*, 125 F. Supp. 2d 730, 738 (D. Md. 2001). To establish standing on behalf of its members,

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the organization must show that (a) the members have suffered an injury and have standing to bring their claims on their own, (b) the interest sought to be protected is germane to the organization's purpose, and (c) "neither

the claim made nor relief sought requires the participation of its members." *White Tail Park, Inc. v. Strouble*, 413 F.3d 451, 458 (4th Cir. 2005).

The complaint does not allege any injury suffered by the members of NOEL, and thus NOEL appears to be bringing a claim to assert the organizations' rights. To the extent that the complaint alleges that NOEL suffers an injury because it is unable to fulfill its purpose of bringing legal challenges in the hopes of establishing "equal humanity of preborn children," the Court does not find this injury sufficient to meet the requirements of standing. First, as Defendants note, NOEL is fulfilling its purpose of pursuing constitutional challenges by the very act of filing this lawsuit. Moreover, as pointed out by Defendants, this Court has already ruled that a mere "conflict between a defendant's conduct and [an] organization's mission is alone insufficient to establish Article III standing." *Buchanan*, 125 F. Supp. 2d at 737-38 (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1429-30 (D.C. Cir. 1996)).

The court in *Buchanan* further stated that an "abstract social interest . . . was insufficient to support Article III standing." *Id.* Accordingly, the Court finds that NOEL's desire to obtain equal rights for the unborn by bringing constitutional challenges is no more than an "abstract social interest" which the Court is not permitted to entertain without a more concrete injury.

C. Adoptive parents

The putative adoptive parents allege that they have children whom they adopted in vitro and are "considering the adoption of and/or seeking to adopt in vitro human embryos," and assert that Defendants' actions will "necessarily reduce the number of in vitro human embryos available for adoption." (Compl. ¶ 82.) Although it is arguable from the complaint whether the potential

adoptive parents have concrete plans to adopt an embryo, for the purposes of a motion to dismiss, the Court must infer this allegation in favor of the Plaintiffs. However, the guidelines proposed by NIH to implement Executive Order 13505 restrict federal funding to embryos donated for research purposes after the donors of the unused embryos no longer need the embryos for reproduction. Moreover, the draft guidelines specifically require the donors to be informed of all their options concerning their unused embryos and seek to create precautions to ensure that donors are not influenced into choosing donation for research over other options suchas storage for later use, adoption, or disposal. Thus, it is the donor's choice which could potentially reduce the number of human embryos for adoption and not the Defendants' conduct which "causes" Plaintiffs' alleged injury. Accordingly, the Court concludes that the adoptive parent Plaintiffs lack Article III standing to assert any claim alleged in the complaint.

Moreover, the Court notes that the adoptive parent Plaintiffs cannot overcome the prudential limitations to standing. First, given the hypothetical nature of these unspecified embryos the Court finds that the Plaintiffs do not stand in a sufficiently close relationship to the embryos to bring a claim on their behalf. In any event, the embryos must themselves have standing on their own for the adoptive parents to represent their claims, and as discussed above, embryos lack such standing. Moreover, the adoptive parents argue that "as federal taxpayers who are morally opposed to destructive stem cell research, [they] clearly fall within the zone of interest that the Dickey-Wicker Amendment seeks to protect," which they allege is "to keep federal taxpayers from being morally complicit in the killing of embryos for their stem cells."

(Doc. No. 12 at 45.) However, as Defendants point out, this type of claim is exactly what the prudential limitations to standing were intended to foreclose. Otherwise, such

claims would open the "floodgates" of the court and would permit any taxpayer with a moral or political opposition to a governmental action to hash out those grievances in court. The prudential limitations on standing exist, even when Article III standing can be established, because the "judiciary [should] seek to avoid deciding questions of broad social import where no individual rights would be vindicated . . . ." *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979)). Accordingly, this Court declines to exercise its jurisdiction to hear this case based solely on Plaintiffs' moral opposition to human embryo stem cell research.

CONCLUSION

For the foregoing reasons, the Court holds that all of the presented Plaintiffs lack standing to assert the rights and claims alleged in the complaint. Therefore, the Court GRANTS Defendants' Motion to Dismiss (Doc. No. 10). A separate order shall follow this Memorandum Opinion. November 24, 2009 /s/ Date Alexander Williams, Jr. United States District Court Judge

FIFTH AMENDMENT TO THE U.S. CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THIRTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any

State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.